"The test is to ask which party will be successful if no evidence is given, or if no more evidence is given than has been given, at a particular point of the case, for it is obvious that as the litigation travels on the parties reach points at which the onus of proof shifts and the Court will have to say that if the case stops there, it must be decided in a particular manner." — Abrath v. North Eastern Railway Co.(1).

If this test is satisfied the Court will call on the opposite party. In that sense the onus shifts but this does not mean that the party objecting to revaluation is required to prove that a specific demand was made. It is enough if he destroys the effect of the evidence adduced by his adversary.

Where there is a conflict of evidence on this issue the final question is whether, on the case as a whole, the probability that no demand was made within three months of the payment is so high that the Judge thinks he ought to act on that view.

On the pleadings in the case before us the onus was on the plaintiffs; they accepted it without argument; they discharged it and if the defence had called no evidence, the plaintiffs must have succeeded. There was an onus on the defendants at that stage; their evidence of demand was weak and there was no evidence on which the Court could have found that the alleged oral demand was actually made within three months; they therefore failed to counter the effect of the plaintiffs' evidence.

I do not think that when the learned trial Judge said that the onus was on the defendants he was expressing his opinion on the general question of law; he was referring to the case before him at a particular stage and in those circumstances it was not a misdirection.

Reference was made to *Arunasalam v. Ng Tai Nyong*(2) where it was ruled that the defendants ought to begin but the Court of Appeal on that occasion did not examine the question of onus. That case also was in fact conducted on the principle already stated. It was an Originating Summons in which there were no pleadings. The first affidavit was insufficient to bring the case within the statute but before the hearing the plaintiffs filed a further affidavit in which it was sworn that no demand had been made; the defendants, who appeared in person, filed no affidavit but desired to adduce oral evidence of demand and the matter was accordingly adjourned into Court for their witnesses to be examined orally and cross-examined. At that stage and in those circumstances it was virtually necessary for them to begin. That case is not an authority on the onus of proof but it is consistent with the view taken in this judgment.

For these reasons I am of opinion that this appeal should be dismissed with costs.

Russell, J. : — I have had the advantage of reading the judgment of the learned Chief Justice. I agree with it and do not wish to add anything.

Appeal dismissed.

A.L.S. SADAYAPPA CHETTIAR
v.
P.C.R.ML. LETCHUMANAN CHETTIAR.

[Court of Appeal (Foster Sutton, C.J., Taylor and Wilson, JJ.) May 28, 1951]

[F. M. — Civil Appeal No. 40 of 1950]

Debtor and Creditor (Occupation Period) Ordinance, s. 4(2)(b)(ii) — Burden of proof.

The Court following their own decision in **Abdul Hameed Mohamed Ibrahim and Company** v. **A. M. S. Nainam Sahib and Company** (reported in this issue) held that in this case the plaintiff was seeking relief which he could obtain only if he could show that the payment was made by the defendant in the circumstances set out in section 4(2)(b)(ii) of the Debtor and Creditor (Occupation Period) Ordinance, 1948. The plaintiff is the person asserting that a certain state of facts is absent, and in order to succeed he must prove that averment positively.

Cases referred to :—

(1) *Connecticut Fire Insurance Co. v. Kavanagh* (1892) A.C. p. 473.
(2) *Abdul Hameed Mohamed Ibrahim & Co. v. A. M. S. Naimam Sahib & Co.* (1951) M.L.J. 103; 11 M.L.R. 71.
(3) *Abrath v. North Eastern Railway Co.* 11 Q.B.D. p. 452.
(4) *Shedden v. Patrick* (1869) L.R. 1 H.L. Sc. 470, 545.

APPEAL.

F. G. Charlesworth for the appellant.

W. G. W. Hastings for the respondent.

Foster Sutton, C.J. : — In this case certain property belonging to the defendant-appellant had been conveyed by him by an Indenture of Statutory Mortgage dated 6th October, 1941, to secure to the plaintiff-respondent repayment of $26,000 and interest thereon.

On the 16th of July, 1943, the appellant paid a sum of $10,000 to the respondent, and on the 25th September, 1944, he made a further payment of $16,000 in Japanese currency, together with all interest then owing under the mortgage, and the respondent then caused the property comprised in the mortgage to be

re-conveyed, and the title deed returned to the appellant.

The respondent commenced these proceedings by way of Originating Summons taken out in Malacca under section 11 of the Debtor and Creditor (Occupation Period) Ordinance, 1948. The Summons asked for a declaration that the re-conveyance of the mortgaged property was void as against the mortgagor and for an order that the security be re-instated to the extent of the last payment after its revaluation under the same Ordinance.

In support of the claim an affidavit was sworn to and filed by the respondent's attorney, paragraph 4 of which reads as follows :—

"My Principal the Plaintiff nor any other person on his behalf demand payment of the principal sum due under the said mortgage".

The affidavit was answered by an affidavit sworn to by one Ramalingam Pillay who was the manager of the appellant's business in Malacca and his attorney during the occupation period. In that affidavit he alleged that the respondent's then attorney repeatedly demanded repayment of the mortgage debt, and that it was as a result of such demands that the two payments I have already referred to were made. He further alleged that after the first payment had been made, the respondent's then attorney continued to press for payment of the balance, that such pressure continued until the beginning of September, 1944, and that in order to comply with the demands he, on each occasion, had to sell land belonging to the appellant in order to make payment.

At the trial the respondent's Advocate opened his case by submitting that the issue was one of "demand for defendant to prove". The appellant's Advocate concurred in that proposition, and proceeded to call evidence. No witness were called on behalf of the respondent.

Before us Mr. Charlesworth appeared on behalf of the appellant and Mr. Hastings on behalf of the respondent. Neither of them appeared for the parties in the Court below.

In an oral judgment Abbott, J. said : "The evidence called upon the part of the defendant has failed to satisfy me that any demand was in fact made. There must, therefore, be judgment for the plaintiff with costs".

Mr. Charlesworth argued that the onus of proof was upon the plaintiff, not the defendant, and the appellant was not bound by the admission of his Advocate in the Court below, because the question as to where the burden of proof lay was one of law and not of fact. He submitted that it was open to him to argue before us a question of law although it was not taken in the Court below, and he cited the case of *Connecticut Fire Insurance Co. v. Kavanagh*[1] in support of that submission. He further argued that paragraph 4 of the respondent's attorney's affidavit, which alleged that no demand for repayment had been made, was hearsay and inadmissible under O. 36 r. 3(1) of the Rules of the Supreme Court, Straits Settlements, as this was not as interlocutory application and the deponent was therefore confined to deposing to such facts as he was able of his own knowledge to prove; that he was not the respondent's attorney during the occupation period and as it was not suggested that he had any personal knowledge regarding the allegation that no demand had been made, paragraph 4 of his affidavit should have been completely disregarded. In conclusion Mr. Charlesworth submitted that without proof that no demand had been made, there was no case for the appellant to answer, and he was therefore entitled to judgment.

On behalf of the respondent Mr. Hastings argued that the onus rests on the person asserting the affirmative, and that in a case such as this it is upon the defendant. During the course of his argument he did, however, agree that the plaintiff must make some assertion that no demand was made, but he went on to submit that the "barest assertion would suffice". He further argued that as no objection to the affidavit was taken at the trial and the defendant's Advocate acquiesced in the proposition that it was for him to begin, the farthest we should go if we were against him would be to order a new trial. He further submitted that it was the practice in Malacca for the defendant in such cases to accept the onus of proof that a demand had been made and that such practice could not entirely be disregarded by this Court.

This Court has already held in the case of *Abdul Hameed Mohammed Ibrahim and Company v. A. M. S. Nainam Sahib and Company*[2], that in these cases where the plaintiff is seeking to obtain a revaluation under section 4(2) (b) (ii) of the Debtor and Creditor (Occupation Period) Ordinance, 1948, of a payment made to him by the defendant, the onus of proof that no demand was made is upon the plaintiff. It is true that in a sense the plaintiff in such a case is required to prove a negative, and that the principle that the party who asserts the affrmative in any controversy must prove his assertion has received wide recognition, but as Woodroffe says, 9th edition, at page 704 :—

"But in order to determine the burden of proof it is necessary to look for the affirmative in substance of the issue and not the affirmative in form. Thus a legal

affirmative is by no means necessarily a grammatical affirmative, nor is a legal negative always a grammatical negative. Allegations essential to the support of a party's case, although negative in form, may be affirmative in reality; and the nature of language is such that the same proposition may in general be expressed at pleasure in an affirmative or negative shape. The rule may therefore more correctly be laid down that the issue must be proved by the party who states the affirmative in substance and not merely the affirmative in form".

Here the plaintiff was seeking relief which he could obtain only if he could show that the payment was made by the defendant in the circumstances set out in section 4(2)(b)(ii) of the Debtor and Creditor (Occupation Period) Ordinance, 1948. The plaintiff is the person asserting that a certain state of facts is absent, and in order to succeed he must prove that averment positively. In *Abrath v. North Eastern Railway Co.*[3], Brett, M.R. when dealing with the question of onus of proof in that case said :—

"But then it is contended (I think fallaciously) that if the plaintiff has given prima facie evidence, which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as to the decision of the question itself. This contention seems to be the real ground of the decision in the Queen's Bench Division. I cannot assent to it. It seems to me that the propositions ought to be stated thus: the plaintiff may give prima facie evidence which, unless it be answered either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour: the defendant may give evidence either by contradicting the plaintiff's evidence or by proving other facts: the jury have to consider upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls upon them to answer; if they are, they must find for the plaintiff; but if upon consideration of the facts they come clearly to the opinion that the question ought to be answered against the plaintiff, they must find for the defendant. Then comes this difficulty — suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff: in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able by the additional facts which he has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him".

In my opinion, the same principles should be applied by the Court when dealing with the type of case under consideration here.

Paragraph 4 of the respondent's attorney's affidavit does not contain facts which the deponent was able of his own knowledge to prove, as required by O. 36 r. 3(1) of the Rules of the Supreme Court, Straits Settlements, and it was, therefore, inadmissible, but I agree with Mr. Hastings that the appellant having failed to object to it at the trial, his complaint about it before us should be disregarded. The practice of filing such affidavits is, however, wrong, and the sooner they are drawn so as to avoid matters which they should not contain and are not evidence, the better it will be for the administration of justice. The question of its evidentiary value in discharging the onus of proof which was upon the plaintiff is another matter. It was the only semblance of evidence produced by the respondent in support of his claim and, in my opinion, it completely failed in its purpose.

Whatever may have been the practice in Malacca regarding which party was required to begin in these cases, it cannot alter the requirement in law that in order to succeed the plaintiff must establish his right to relief under the Ordinance.

It follows from the foregoing that, in my view, this appeal should be allowed, but we also have to consider whether, in the circumstances, a new trial should be ordered. It must have been apparent to the respondent that it was the appellant's intention to contest the respondent's averment that the last payment was made without any previous demand, because the issue is clearly raised in the appellant's attorney's affidavit, dated 7th August, 1950, which was filed on the 19th of that month. There was no suggestion either before us or in the Court below that the respondent was taken by surprise. In determining this question, the principle to be applied is, I think, the one stated by Lord Chelmsford in the case of *Shedden v. Patrick*[4] in these words :—

"It is an invariable rule in all the Courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting a new trial".

That is the principle which has been acted upon by the Courts over a long period. It is obviously in the public interest that litigation should come to an end some time or other; if a party who has been defeated in a case is allowed to come to the Court and say "Now let me have another try, I have found some more evidence", litigation will never be brought to a conclusion, and consideration scope will be afforded to the concoction of evidence. In this case the respondent chose to proceed on the material I have already referred to, and I can see no good reason for ordering a new trial. That being so, I would allow this appeal and enter judgment for the defendant with costs in the Court below. In view of the fact that his Advocate in the Court below concurred in the procedure adopted there, I would make no order as to costs on this appeal.

Taylor, J. : — I concur.

Wilson, J. : — I concur.

Appeal allowed.